No. 13,865

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

RENE BUSSOZ,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.

Jurisdictional Statement.

(a) The United States District Court for the Southern District of California had jurisdiction by virtue of 8 U. S. C. 701 (Jurisdiction to Naturalization), and the matter came before the Court on the Motion of the United States of America for an Order denying the Petition of Rene Bussoz, a citizen of France, for naturalization [Tr. 5].

(b) This Court has jurisdiction by virtue of 28 U. S. C. 1291 (Final Decisions of District Courts).

II.

Statement of Case.

This is an appeal from a Judgment of the United States District Court for the Southern District of California, ordering the petitioner Rene Bussoz, appellee herein, admitted to citizenship [Tr. 23] over the objections of the United States of America, through the Immigration and Naturalization Service, based on the ground that appellee was debarred from becoming a citizen of the United States by virtue of the provisions of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. 303(a)), in that he applied for exemption from military service during World War II as an alien of a neutral country [Tr. 5].[1]

III.

Statutes Involved.

Section 3(a) of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885 (50 U. S. C. App. 303(a)), provides:

> "Sec. 3(a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. Provided, that any citizen or

---

[1]Another objection was made on the ground that appellee "had failed to establish good moral character during the period required by law." The appellant does not challenge the Trial Court's finding in favor of the appellee on this issue.

subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: * * *."

Section 10 of the Selective Training and Service Act of 1940, 54 Stat. 893 (50 U. S. C. App. 310), provides in part:

"(a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act; * * *

(3) to appoint by and with the advice and consent of the Senate, * * *, a Director of Selective Service who shall be directly responsible to him * * * to carry out the provisions of this Act;

* * * * * * * *

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act * * *."

Title 32, Code of Federal Regulations (Cumulative Supplement), Regulation 603.1, page 9095, provides in part:

"§603.1 Director of Selective Service. The Director of Selective Service is responsible directly to the President. He is hereby charged with the administration of the selective service law and is hereby authorized and directed:

(a) To prescribe such amendments to the regulations in this part as he shall deem necessary.

(b) To issue such public notices, orders, and instructions as shall be necessary to the efficient administration of the selective service law.

* * * * * * * *

(e) To perform such other duties as shall be required of him under the selective service law. * * *"

Title 32, Code of Federal Regulations (Cumulative Supplement), Part 601, page 9092, provides in pertinent part as follows:

"PART 601—DEFINITIONS.

* * * * * * * *

§601.1 Definitions to govern. The definitions contained in this part shall govern in the interpretation of the Selective Service Regulations.

§601.2 Aliens. (a) The term 'alien' means any person who is not a national of the United States.

* * * * * * * *

(c) The term 'citizen or subject of a neutral country' is used to designate an alien who is a citizen or subject of a country which is neither a cobelligerent country nor an enemy country. * * *"

IV.

Statement of Facts.

Appellee, a 48-year-old native and national of France and a former resident of Paris, has resided in the United States since his lawful admission into this country for permanent residence on December 6, 1939 [Tr. 3]. On May 8, 1940, he filed his declaration of intention to become a citizen of the United States [Tr. 108]. During World War II, he registered for Selective Service but he

desired to avoid military service and discussed the possibility of such avoidance with his Local Board officials who informed him that France was then a neutral country [Tr. 44-46, 96, 118].

On April 5, 1943, appellee filed with the Local Board an application for relief from military service (D. S. S. Form 301) [Tr. 107] in which he stated he was a citizen of France "which is neutral in the present war." Said application further provided:

> "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States" [Tr. 108].

At the same time, appellee filed an "Alien's Personal History and Statement" (D. S. S. Form 304) [Tr. 110] in which under question No. 41 he stated:

> "I do object to service in the land or naval forces of the United States [Tr. 113]; see attached Affidavit."

The Affidavit [Tr. 117] states in effect that if appellee entered the service and were captured, he would not be treated as a prisoner of war but would be considered a guerrilla "and be shot forthwith" and that if the enemy learned of his becoming a member of the United States Armed Forces, they would seek vengeance against his family residing in France [Tr. 118, 119].

At the time of filing his application for exemption, appellee surrendered his copy of declaration to become a citizen which he had previously executed on May 8, 1940 [Tr. 97] and on April 12, 1943, appellee was granted relief

from training and service under the Selective Training and Service Act of 1940, in accordance with his application as a citizen of a country neutral in the war, and he was reclassified by Local Board No. 15 from Class I-A to Class IV-C [Tr. 98].

On October 24, 1944, appellee was reclassified as being "over age for military service" [Tr. 99].

Appellee filed his Petition for Naturalization on September 20, 1949 [Tr. 3, 4], and the United States moved for an Order denying the Petition for Naturalization [Tr. 5].

The lower Court, after hearing the Motion and considering the evidence concluded that on April 5, 1943, France was not a neutral country, and as a consequence the statute that would render appellee ineligible for naturalization did not apply to him [Tr. 16, 21]. The Court thereupon denied the Motion of the United States and ordered appellee admitted to citizenship [Tr. 23].

V.

Questions Presented by Appeal.

(a) Whether the determination by the National Director of Selective Service that France was, for a period from 1942 to 1943, a neutral state for the purpose of exemption from military service under Section 3(a) of the Selective Service Act is binding on the courts so as to preclude naturalization of an alien who secured exemption on the basis of such ruling.

(b) Whether the appellee is estopped from now repudiating his prior deliberate act in filing application with the Local Board for relief from military service (D. S. S. Form 301) as a result of which he has enjoyed well calculated benefits.

VI.

ARGUMENT.

A. Recognition of Foreign Governments or of Belligerency in Case of Insurgency Are Strictly Political Matters Within the Prerogative of the Executive Alone or in Cooperation With Congress, and Not Subject to Judicial Review.

The determination in time of war of who are and who are not neutral nations in dealings of external nature of an international character is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the courts.

United States v. Curtis Wright Corporation, 299 U. S. 304, 319;

Oetjen v. Central Leather Company, 246 U. S. 297, 302;

Jones v. United States, 137 U. S. 202, 212.

The courts merely take judicial notice of the action of the Executive in such matters, which are binding on all agencies, citizens and subjects of the United States.

United States v. Belmont, et al., 301 U. S. 324, 330;

Oetjen v. Central Leather Company, supra.

It is based on the fact that the Constitution has committed the conduct of our foreign relations to the political departments of the government.

United States v. Curtis Wright Corporation, supra;

Oetjen v. Central Leather Company, supra.

Customarily, the Department of State is the agency through which the President acts in his role as our constitutional representative in foreign affairs. Consequently, if the ruling with respect to the neutrality status of France on April 12, 1943, had been made by the State Department, there would be no doubt that the courts would be bound by such determination. But for the purpose of carrying out the provisions of the Selective Training and Service Act of 1940, the President, under congressional authority (50 U. S. C. App. 310(b)) delegated to the Director of Selective Service all the authority (except the power to conscript industry) vested in him under the Act, including the making of rules and regulations for determining the status of registrants seeking exemption from service as neutral aliens under Section 3(a) of the Act. Necessarily included in this delegation was the executive authority to determine the war status of the foreign states whose nationals had registered under the Act.

Cf., Dingman v. United States, 156 F. 2d 148, 150 (C. A. 9), *cert. den.* 329 U. S. 730;

Roodenko v. United States, 147 F. 2d 752 (C. A. 10), *cert. den.* 324 U. S. 860.

It seems, therefore, that the Selective Service Director's determination during World War II, especially if made with the collaboration and advice of the State Department, that a foreign state was a neutral in that war [see appellant's (defendant's) Exs. G, H, I, J], was as much a political act of the Executive and as binding on the courts as if it were made by the State Department itself.

B. Was France a Neutral Within the Terms of the Regulation?

As will appear in this brief under the heading Statutes Involved, *supra,* the Director of Selective Service issued Regulation No. 601.2 defining the term, for the purpose of the Act, "citizen of a neutral country" as being used to designate an alien who is a citizen or subject of a country which is neither a cobelligerent country nor an enemy country.

The questions then are: Was this a reasonable regulation? And did France at the time fit this definition?

To state the proposition more broadly, it is the appellant's contention that even if the determination of neutrality is reviewable, the District Court was not warranted in overruling the determination made by the Director. The concept of neutrality for the purposes of the Selective Service Law was not necessarily the same as for other purposes and in other contexts. For example, the regulation by the Director of Selective Service that aliens who have resided in this country more than three months shall be deemed resident aliens unless they apply for determination of status has been upheld as applied to an alien admitted as a business visitor against the claim that in many other aspects he was not deemed a resident.

> *Mannerfrid v. United States,* 200 F. 2d 730 (C. A. 2), *cert. den.* March 7, 1953.

The same rule should be applied to the situation here presented. The determination that in the peculiar situation of France in 1942 and 1943, it was a neutral for the pur-

poses of Selective Service was not unreasonable, and should therefore not be disregarded by the courts to confer benefits upon an alien who knowingly waived such benefits.

The Court in its findings of fact No. 9 [Tr. 19] states in part in quoting from the Encyclopedia Britannica:

> "On June 22, 1940, France surrendered, and on July 10 (after armistice was signed with Germany and Italy) France became a totalitarian state, with Petain as chef d'etat."

Is it unreasonable then after France's surrender for the Director of Selective Service to apply the definition of Regulation 601.2(c) that France which had surrendered was not a "co-belligerent"? And surely France was not by any definition considered "an enemy country." If then, France was neither a co-belligerent nor an enemy country, it fits the definition of the regulation though for other purposes and other concepts of neutrality France may not have been considered a "neutral" in the usual sense. Thus, as was stated in *United States v. Obermeier,* 186 F. 2d 243 at page 247 by the Court of Appeals for the Second Circuit:

> "We start with these doctrines:
>
> 1. A Regulation is presumptively valid and one who attacks it has the burden of showing its invalidity.
>
> 2. A Regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute."

As stated by Judge Goddard in the United States District Court for the Southern District of New York in *In re Molo,* 107 Fed. Supp. 137 (June 3, 1952), at page 139:

> "It is evident that Congress did not intend to restrict 'neutral' to its narrowest definition. To have

done so would have caused an insuperable burden on the Selective Service system to weigh carefully every action by a 'neutral' nation to determine when it superseded the bounds of impartiality or when it returned thereto and to analyze the day by day position of each nation. A definite standard was essential for the efficient operation of the Selective Service System. Congress clearly did not intend to hamper the procurement of manpower in those critical times with such uncertainties. Such a conclusion is quite unlikely.

The Director of Selective Service adopted the Regulation which for the purposes of the Act, drew a clear-cut line and provided for the efficient and speedy administration of the Act. It clearly protected the right of 'neutrals.' The Regulation was plainly a fair and reasonable one and consistent with the Act. * * *"

With regard to France, the Director of Selective Service acted with the aid and advice of the State Department as will be seen by reference to Appellant's (Defendant's) Exhibits D through J, recognizing that "Free France" which was fighting was within the definition of the Regulation a co-belligerent, while the France that had surrendered was certainly not an "enemy country," neither was it "a co-belligerent country."

The purpose of the legislation was for, as Judge Goddard says, the protection of the rights of "neutrals" and appellee availed himself of that protection when it was to his best interest to do so.

C. Should the Appellee Be Estopped Now From Repudiating His Prior Deliberate Acts as a Result of Which He Had Enjoyed Well Calculated Benefits?

The facts in the instant case are remarkably parallel to the case of *In re Molo, supra.* There, the petitioner signed D. S. S. Form 301 on July 21, 1943. The appellee signed the form on April 2. 1943. In the *Molo* case, petitioner there wrote a letter on November 21, 1944, requesting rescission of his D. S. S. Form 301. Here, the appellee wrote his letter on November 6, 1944. As stated by Judge Goddard at page 140 of the *Molo* case:

> "The petitioner's sincerity and motives are suspect in writing the letter of November 21, 1944, requesting rescission of his Form D. S. S. 301 which he had signed on June 21, 1943. It was written nine months after he had been classified IV-F and when he was over thirty-eight years old and thus no longer liable to be inducted. See Petition of Perez, D. C. 81 F. Supp. 591; In re Martinez, D. C. 73 F. Supp. 101 at page 102."

It will be noted that the appellee wrote his letter on November 6, 1944 *after* he was reclassified as being "over age for military service" on October 24, 1944.

On the facts, there might be extenuating circumstances which may encourage a sympathetic decision in appellee's favor. But at the same time, it seems highly inconceivable that, having voluntarily asserted under oath in his D. S. S. Form 301 that he was a citizen of France, "which is neutral in the present war," and having acquiesced in his

treatment as a neutral alien and thereby received the desired benefits, appellee should years later be allowed to disclaim the status given him.

The debarment from citizenship is a serious deprivation, but it was the inevitable consequence, as appellee well understood, of his voluntary choice to accept exemption from military service.

His hope that his claim to exemption would not lead him to debarment was his own; no responsible official gave him any assurance that the consequence of debarment could be avoided.[2]

The penalty of debarment imposed by the statute is clear and unequivocal, and the Court may not amend its provisions,

> "by inserting or adding a provision to the effect, that where there are extenuating circumstances, the Naturalization Court may ignore the plain provisions of the law"
>
> *Petition of Fatoullah,* 76 Fed. Supp. 499-500 (E. D., N. Y.).

And as stated by Mr. Justice Minton in *Moser v. United States,* 341 U. S. 41 at page 46:

> "The qualifications for and limitations on the acquisition of United States citizenship are a political matter * * *.

---

[2]The advice he received from his Local Board advisor was merely that at some future date he might explain to a Naturalization Court the circumstances under which he sought the exemption. *Cf. Moser v. United States,* 341 U. S. 41, wherein the petitioner filed his application for exemption only after "seeking information from the highest authority to which he could turn."

> Thus, as a matter of law, the statute imposed a valid condition on the claim of a neutral alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship."

Appellee sought exemption as an alien of a neutral country. Under the Rules and Regulations of the Selective Service Act and instructions given to appellee's Local Board, the status which appellee claimed for himself "that of a neutral alien" was recognized by his Local Board, and he was granted the exemption from military service which he sought. When the appellee signed D. S. S. Form 301, he was fully aware that he was bartering the privilege of becoming an American citizen for the right to remain out of uniform. As stated by District Judge Kaufman in *Application of Mannerfrid,* 101 Fed. Supp. 446 at page 448:

> "His only error was a lack of foresight, and inability to foresee that his attitude might change when World War II faded into history, and citizenship could be obtained without the necessity of exposing himself to the hazards of warfare."

And as stated by District Judge Gourley in *In re Martinez, supra,* page 108:

> "It does not seem fair or reasonable to me at this late date that an individual should escape the consequences of declarations against interest contained therein, by any resort to impeachment of what may have been set forth in a questionnaire or in a form which might have been executed."

Conclusion.

Thus to summarize:

1. Appellant contends that the determination of which nation was and which nation was not neutral within the meaning of the Selective Training and Service Act of 1940, was a matter for the Executive which the Court may not go behind.

2. Even if the determination of neutrality is reviewable by the Court, the Regulation defining a citizen of a neutral country was valid unless unreasonable or inappropriate or plainly inconsistent with the statute. The concept of neutrality for the purpose of the Selective Service Law is not necessarily the same as for other purposes and any other contexts, and as stated by District Judge Goddard in *In re Molo, supra:*

> "The Director of Selective Service adopted the Regulation which, for the purposes of the Act, drew a clear-cut line and provided for the efficient and speedy administration of the Act. It clearly protected the rights of 'neutrals.' The Regulation was plainly a fair and reasonable one and consistent with the Act."

Viewed in this light, France, after her surrender, was no longer "a co-belligerent country nor an enemy country" and fitted the definition adopted by the Director of Selective Service.

3. Appellee clearly understood the consequences of his act, enjoyed the well calculated benefits thereof, and should

be estopped now from repudiating his prior deliberate acts.

4. The penalty of debarment imposed by the statute is clear and unequivocal.

5. Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant.

United States v. Manzi, 276 U. S. 463, 467.

And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the Court as to any esential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

United States v. Schwimmer, 279 U. S. 644, 649-650.

Wherefore, appellant earnestly contends that the appellee, having sought and received exemption from military service as a citizen of France "which is neutral in the present war" should be debarred from citizenship and the judgment of the lower Court should be reversed.

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